IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16333 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JASHIBEN W/O. SUKHLAL SHANA- BHAI MALI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 16333 of 2003

MS SUBHADRA G PATEL for Petitioner No. 1

Ms P B Sheth, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 31/03/2004

ORAL JUDGEMENT

The petitioner-detenu has preferred this petition under Article 226 of The petitioner-detenu has preferred this petition under Article 226 of the Constitution of India for appropriate writ, order or

direction for quashing and setting aside an order dated 21.10.2003 passed by respondent no.2 under section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 (for short, 'the PASA Act') directing detention of the present petitioner.

2. It was alleged against the petitioner that four offences under the Bombay Prohibition Act were registered against the detenu before North Region Prohibition Police Station CR No.212/2002, 509/2002, 1244/2002 and 1321/2003 on 27.1.2002, 27.2.2002, 22.7.2002 and 17.9.2003. It was alleged against the detenu that he was found in possession of illicit country liquor in huge quantity. It was also alleged against the detenu that two witnesses had rendered statements against the detenu whose names have not been disclosed. That on the strength of registered and unregistered offences, the detenu was found to be a bootlegger and therefore, the order of detention has been passed detaining the detenu.

3. On receiving the petition, rule was issued and in response to the service of notice of rule, Ms. P B Sheth, learned AGP has appeared. She has also submitted affidavit of the detaining officer which is taken on record. At the stage of final hearing, learned Advocate for the petitioner has argued that though one offence has been registered against the petitioner and though two unnamed persons appear to have given some statements against the petitioner, the petitioner is not shown to be a person who could be treated to be a dangerous person or a person who has committed violation of public order and, therefore, the detaining authority ought not to have passed the order in question directing his detention in terms of the said order.

4. It is well settled that names of the witnesses are required to be disclosed to the detenu. This has not been done in the present case on the ground that the names of the witnesses could not be disclosed and privilege under section 9(2) has been claimed. Here it is also well settled that before claiming of power under section 9(2) of the Act, the detaining authority is required to have credible material before him in order to come to a finding in order to ascertain the genuineness and correctness of the statements made by the witnesses. If this is not done, then non-supply of names of witnesses would be fatal to the detention order. This position can be gathered from a decision dated 4.12.2003 in Special C.A. No.14925/2003 (Coram: Hon'ble Mr Justice A L Dave) wherein it has been held that mere verification of the statement given before a subordinate

police officer is not enough. It has also been observed therein that the detaining authority is to satisfy itself by proper examination of witnesses and other materials, in order to arrive at a finding that there is a probability of having a reasonable apprehension in the mind of the witnesses expressing fear of the detenu.

5. In the present case also names of the witnesses have not been disclosed and there appears to be no credible material before the detaining authority for non-disclosure of the names of the witnesses. Therefore, this case is squarely covered by the decision of this court as stated above. Then the learned AGP has relied upon a decision in the case of Kanuji S Zala v. State of Gujarat & Ors. 2000(4) GLR 3256 wherein it has been held that when it has been observed that the offences under the Bombay Prohibition Act amounts to a threat to public health, and the activity of the detenu was likely to cause harm to the public health and that by itself is sufficient to affecting adversely the public order as defined by the Act. This decision was required to be considered in Special C.A. No.16542 of 2003 by this court (Coram : Hon'ble Mr Justice N G Nandi). There also this court has found that there should be further credible material before the detaining authority in order to come to a finding that the alleged bootlegging activities of the petitioner would lead to a threat to public health. In the present case we find that such materials do not appear on record .

6. Therefore, in absence of such a material before him, the order of detention could not have been passed. In other words, if such an order has been passed without any such material, it cannot be sustained in the eye of law. Therefore, with respect to registered offence, there was no credible material for coming to a finding that the alleged bootlegging activities would lead to danger to public health and with respect to the unregistered cases, the detaining authority did not have any credible material with him in order to come to a decision that there was genuine and reasonable apprehension of fear in the mind of the witness and therefore, their names were required to be withheld from the knowledge of the detenu. On both the grounds, the order of detention passed against the detenu is illegal and deserves to be quashed and set aside.

7. For the foregoing reasons, this petition is allowed. The impugned order dated 21.10.2003 passed by respondent No.2 in exercise of powers under section 3(2) of the PASA Act detaining the present petitioner, is

ordered to be set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp